

T. BROWN CONSTRUCTORS, INC.

IBLA 87-436

Decided May 28, 1987

Appeal from a decision of the Farmington, New Mexico Resource Area Office, Bureau of Land Management, giving notice of termination of mineral material sales contract MS 30-010-(F)77-1.

Affirmed

1. Bureau of Land Management -- Materials Act

A determination to not waive a breach of contract for sales of mineral materials will not be overturned absent a showing that the determination is arbitrary, capricious, or not in the best interest of the Federal Government.

APPEARANCES: Ted F. Brown, President, T. Brown Constructors, Inc., Albuquerque, New Mexico, for appellant; Margaret C. Miller, Esq., Office of the Solicitor, Southwest Region, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

T. Brown Constructors, Inc., appeals from a decision of the Area Manager, Farmington Resource Area Office, Bureau of Land Management (BLM), dated April 1, 1987.<sup>1/</sup> By this decision, BLM terminated mineral material sales contract MS 30-010-(F)77-1.

This is the second review of a determination by BLM terminating mineral material sales contract MS 30-010-(F)77-1. In the first decision, T. Brown Constructors, Inc., 95 IBLA 107 (1987), the Board held that appellant had breached the terms of the contract and that, under the terms of the contract and the Departmental regulations in effect at the time the contract was entered into, the contract automatically terminated. However, subsequent to the date of the contract the pertinent regulation was amended, granting BLM discretionary authority to waive the breach if BLM finds a waiver to be warranted. Accordingly, the decision was set aside and the case remanded to permit BLM the opportunity to exercise its discretionary authority by waiving

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<sup>1/</sup> An identical decision was also issued on Apr. 8, 1987.

the breach of contract if BLM deemed it to be in the Department's best interest to do so.

After remand, BLM reviewed the matter, concluded the exercise of BLM's discretionary authority to waive the breach was not warranted by the facts, and notified appellant that the contract was terminated by decision dated April 1, 1987. Appellant has filed a notice of appeal and statement of reasons. BLM has filed an answer and request for expedited consideration. Expedited consideration is hereby granted.

On appeal, appellant has advanced a number of reasons for a finding of error. Many had been addressed in T. Brown Constructors, Inc., supra, and need not be addressed further. We will, however, address two of the issues raised.

[1] Appellant argues that the terms of section 23 of the contract provide for notice and time to take corrective action prior to a finding that the contract is terminated for breach. However, as previously noted, "[S]ection 2 of appellant's sales contract provides for automatic termination of the contract upon failure to make the required payment on or before the anniversary date \* \* \*." T. Brown Constructors, Inc., supra at 109. Section 23 is not applicable to a failure to make the in-lieu payment in a timely manner. BLM need not give notice and an opportunity to cure for such a failure.

The second argument is that the decision is not supported by the rule-making, because the Area Manager did not set forth reasons why the Government's interest is better served by terminating the contract. In doing so, appellant has misstated the nature of BLM's discretionary authority. Without exercise of discretionary authority the contract would terminate by its own terms. Therefore, if BLM were to determine it to be in the Government's best interest to waive the breach, it would be required to support that decision with a statement of why it would be in the Government's best interest to do so. The record need only be sufficient to establish that there is a reasonable basis for that decision and that the decision was neither arbitrary nor capricious. See, e.g., Suzanne Walsh, 94 IBLA 249 (1986); Reed & Stevens, Inc., 93 IBLA 84 (1986).

In order to overturn a determination that the option to waive a breach of contract will not be exercised, an appellant must show that it is in the best interest of the Federal Government to do so or that the refusal to do so has been arbitrary or capricious. The BLM decision on remand recited grounds for not waiving the breach of contract, including the fact that the Government had not been receiving the fair market value for the product, and the competitive interest of a number of parties in exploiting the resource which had not been developed by appellant. The record before us is more than adequate to support BLM's determination and appellant has not shown the determination to be arbitrary or capricious.

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Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 1, 1987, BLM decision is affirmed.

Administrative Judge

R. W. Mullen

We Concur:

C. Randall Grant, Jr.  
Administrative Judge

James L. Burski  
Administrative Judge.

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